

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In re: Applications for Station	)	NAL/Acct. No. 20031810005
WKVE, Semora, North Carolina	)	
	)	
HARRYCO, INC. (ASSIGNOR) and	)	File No. BAPH - 19941209GK
SOUTHERN ENTERTAINMENT, INC.	)	
(ASSIGNEE)	)	
For Assignment of Construction Permit	)	
	)	
HARRYCO, INC.	)	File No. BMPH - 19950127JA
For Extension of Construction Permit	)	
	)	
SOUTHERN ENTERTAINMENT, INC.	)	File No. BMPH-19960307IC
for Modification of Construction Permit	)	
	)	
SOUTHERN ENTERTAINMENT, INC.	)	File No. BLH-20010417AAD
For License to Cover Modified Permit	)	
	)	
SOUTHERN ENTERTAINMENT, INC.	)	File No. BALH-20010329AAK
(ASSIGNOR) and	)	
EDUCATIONAL MEDIA FOUNDATION	)	
(ASSIGNEE)	)	
For Assignment of License	)	
	)	
EDUCATIONAL MEDIA FOUNDATION	)	File No. BMLHED-20010502ABA
For Modification of License	)	

**MEMORANDUM OPINION AND ORDER  
AND NOTICE OF APPARENT LIABILITY**

**Adopted: October 30, 2003**

**Released: November 10, 2003**

By the Commission:

1. The Commission has under consideration the captioned applications concerning station WKVE(FM), Semora, North Carolina.<sup>1</sup> The station, currently licensed to Southern Entertainment, Inc. ("Southern"), is the subject of multiple challenges by Piedmont Broadcasting Corporation ("Piedmont"), the licensee of two competing broadcast stations.<sup>2</sup> Two of the pleadings before us are Applications for

<sup>1</sup> At earlier stages of this proceeding, the station was also known as WPXX(FM) and WQVA(FM).

<sup>2</sup> Piedmont is the licensee of WBTM(FM) and WAKG(FM), Danville, Virginia. According to Piedmont, these stations compete with WKVE(FM) for audience and revenues.

Review.<sup>3</sup> The other pleadings have been referred to the Commission because they concern similar issues and facts.<sup>4</sup>

2. At issue in this proceeding is the staff's extension of the initial WKVE(FM) construction permit, under rules that have since been superseded, and the concurrent grant of an application to assign the permit from HarryCo, Inc. ("HarryCo") to Southern over Piedmont's objection. Piedmont's first application for review challenges the rationale for the extension, as well as the character qualifications of HarryCo and Southern. Piedmont requests that the Commission rescind the station's permit and the assignment to Southern. Piedmont did not contest the grant of WKVE(FM)'s initial license. Piedmont did, however, file a second application for review and other pleadings challenging subsequent licensing actions relating to WKVE(FM). In these documents Piedmont opposes many of Southern's subsequent applications, including those for a construction permit to upgrade the station, for a license to cover the upgraded facilities, and for consent to assign the station's license to Educational Media Foundation ("EMF"). EMF seeks to convert the station from commercial to noncommercial educational operations. Piedmont does not specifically contest the proposed change to noncommercial educational status or challenge the qualifications of EMF. Rather, Piedmont's position is that Southern has nothing to sell to EMF because Southern built at its own risk pursuant to a construction permit that was not properly extended, and that Southern lacks the character qualifications needed to assign the authorization. For the reasons discussed below, we affirm prior staff actions, and grant pending applications for license, assignment, and noncommercial status. We also issue a Notice of Apparent Liability to Southern for its submission of two letters with altered dates in violation of Section 1.17 of our rules.<sup>5</sup>

## I. Discussion

### A. Extension Application

3. **Effect of Rule Change.** A central issue in this proceeding is the validity of WKVE(FM)'s construction permit under the rules in effect when construction was completed in February 1996. We have since changed those rules significantly, and the parties dispute whether the changes moot this central question. They do not. In the 1999 *Streamlining* proceeding we automatically extended certain expired

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<sup>3</sup> These include (1) Piedmont's October 7, 1996, Application for Review, alleging that the extension of WKVE's construction permit (File No. BMPH-19950127JA) and assignment of that permit to Southern (File No. BAPH-19941209GK) should be rescinded, and responsive and supplemental pleadings; and (2) Piedmont's October 29, 1998, Application for Review concerning the grant of a permit to Southern to upgrade the station's constructed facilities from Class A to Class C2 (File No BMPH-19960307IC), and responsive pleadings.

<sup>4</sup> See 47 C.F.R. § 0.5(c). See also, *Nassau Community College*, 12 FCC Rcd 12234, n.1 (1997); *Little Rock Radio Telephone Co., Inc.*, 50 R.R.2d 1535 (1982) (referring cases to Commission when cases involving the same facts, parties, or issues are pending before the Commission). The related matters referred to us in the present case are (1) Piedmont's November 14, 1996, complaint, which alleges that Southern's October 23, 1996, Opposition to the Application for Review contained falsified documents, and responsive pleadings; (2) Southern's April 17, 2001, application for a license to cover its upgrade to Class C2 (File No. BLH-20010417AAD) and responsive pleadings; (3) Southern's March 29, 2001, application to assign the authorization to Educational Media Foundation ("EMF") (File No. BALH-20010329AAK) and related pleadings; and (4) EMF's uncontested application to modify the station's license to specify noncommercial educational operations (File No. BMLHED-20010502ABA). To the extent that parties have requested extensions in which to file or respond to pleadings, those requests are granted.

<sup>5</sup> 47 C.F.R. § 1.17.

permits for which forfeiture was not yet final.<sup>6</sup> Southern believes that action extended WKVE's permit without regard to the matters at issue here. The *Streamlining* extension applied, however, only to permits that were valid, as previously extended.<sup>7</sup> The validity of WKVE's last extension is in dispute. We will resolve questions of the permit's validity using the rules in effect at the time the permit was last extended.<sup>8</sup>

**4. Waiver of Construction Deadline.** During the relevant time period, the Commission granted 18-month broadcast construction permits and extended permits for six-month intervals if, among other reasons, construction had not been completed due to circumstances beyond the applicant's control.<sup>9</sup> Whether permittee HarryCo lost financing for reasons beyond its control was a pivotal issue in a January 27, 1995, application for extension of the permit.<sup>10</sup> The staff initially ruled in HarryCo's favor, extending the permit and allowing its assignment to Southern, which completed construction of the station and began to broadcast pursuant to program test authority. In considering Piedmont's petition for reconsideration based on newly available evidence, however, the staff agreed with Piedmont that HarryCo's loss of financing was not beyond HarryCo's control under prevailing case law.<sup>11</sup> Piedmont argued for a reversal of the earlier extension grant, thereby terminating all authority of the station. The staff, instead, waived the requirements of the extension rule.<sup>12</sup>

5. The Commission and its staff may waive a rule for good cause.<sup>13</sup> The staff based the WKVE waiver on the following facts: (1) the assignment from HarryCo to Southern had already been consummated (for slightly more than a year); (2) construction was complete; (3) Southern had commenced program tests (more than five months before the staff's decision on reconsideration) instituting first local service in Semora; (4) reversal would have impacted innocent parties, including Southern's employees and creditors; and (5) although HarryCo had fallen short of demonstrating that its loss of funding was beyond its control, HarryCo nevertheless demonstrated diligence.

<sup>6</sup> *Streamlining of Mass Media Applications*, 14 FCC Rcd 17525, 17536 (1999) ("*Streamlining*").

<sup>7</sup> *Id.*

<sup>8</sup> See *Manahawkin Communications Corporation*, 17 FCC Rcd 342 (2001) (compliance with rule prohibiting the sale of an unbuilt station at a profit considered after that rule's elimination in the *Streamlining* decision, because compliance with the rule was mandated when the parties entered into the financial arrangement on review).

<sup>9</sup> See 47 C.F.R. § 73.3534(b)(1996). That process has since been replaced with a construction period of three unencumbered years. See *Streamlining of Mass Media Applications*, 13 FCC Rcd 23056 (1998), *recon. granted in part and denied in part*, 14 FCC Rcd 17525 (1999).

<sup>10</sup> Under the revised rules, loss of financing is no longer a ground for receipt of additional time. See 47 C.F.R. § 73.3538(b).

<sup>11</sup> Specifically, the staff found that under the principles enunciated in *Horseshoe Bay Centex Broadcasting Co.*, 5 FCC Rcd 7125 (1990), HarryCo's loss of financing after refusal of its creditors to meet a lender requirement would be viewed as HarryCo's own inability to meet its loan commitment rather than as an external event beyond its control. *Letter from Chief, Audio Division, to John F. Garziglia, Esq.*, Ref. No. 1800B3-KDY (M.M.B. Aug. 30, 1996).

<sup>12</sup> *Id.*

<sup>13</sup> 47 C.F.R. § 1.3. See *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

6. Piedmont asserts that the staff erred in finding that WKVE provides first local service to Semora, North Carolina. It maintains that the station really serves Danville, Virginia, which already has radio service. Piedmont alleges that Southern selects WKVE's programming for Danville audiences and showed its allegiance to Danville by joining the broadcasters association in Virginia rather than in North Carolina. The record, however, contains adequate evidence of service that the station provides to Semora.<sup>14</sup> It would not be unreasonable for WKVE also to cover issues concerning nearby communities in Virginia. Semora, North Carolina is a small community of fewer than 200 people, located less than one mile from the Virginia border. Danville is the largest community in WKVE's licensed service area. When the Commission determined that Semora was a community for allotment purposes, it recognized that Semora has a small population, and limited commercial activity.<sup>15</sup> It is longstanding Commission policy to promote initiation of broadcast service in small communities.<sup>16</sup> Stations must provide informational programming to address significant issues and problems of their communities of license, but also have the discretion to cover additional issues that may be of interest to their wider audience. Piedmont has not demonstrated that WKVE failed to provide local service to Semora, North Carolina.

7. Piedmont also alleges that the staff erred in basing the waiver on potential harm to innocent parties associated with Southern. Piedmont maintains that canceling WKVE's permit would not harm innocent parties because: (1) Southern owned twenty-four percent of HarryCo, and therefore cannot be considered unrelated; (2) Southern consummated the assignment at its own risk; (3) Southern's creditors and employees should have been aware that HarryCo's extension application and assignment applications fell short of the requirements for grant; and (4) Southern is not entitled to the equitable relief of a waiver because it had "unclean hands." We reject each of these arguments. Southern's twenty-four percent interest in HarryCo does not necessarily impute to Southern's creditors and employees knowledge of all matters concerning HarryCo's extension application, nor does it demonstrate that Southern's creditors and employees had reason to believe that the staff's grant of Southern's assignment application was improper. The allegation of unclean hands is based in part on an *ex parte* letter from Southern's Vice President to the Commission during the petition for reconsideration stage in this proceeding.<sup>17</sup> The Commission's Office of the Secretary has determined with respect to the letter that "it does not appear that there was any intent to violate the [*ex parte*] rules [and] that no harmful prejudice occurred."<sup>18</sup> Furthermore, the letter was not a part of the record upon

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<sup>14</sup> For example, Southern provides an affidavit from Southern's president, which describes the ways in which the station's issue-responsive programming addresses the needs and interests of Semora residents, as well as those of Caswell County, North Carolina, in which Semora is located. It also submits letters from the County Manager and Sheriff of Caswell County thanking the station for offering informational programming addressing the needs of Caswell County. As will be discussed *infra*, those letters appear to have been solicited rather than written spontaneously, and the dates of the letters were altered. However, the letters accurately reflect that the station aired informational programming featuring Caswell County officials.

<sup>15</sup> See *Implementation of BC Docket No. 80-90*, 5 FCC Rcd 934 (1990) (affirming order allotting channel to the community of Semora).

<sup>16</sup> See 47 U.S.C. § 307(b); *Faye and Richard Tuck, Inc.*, 3 FCC Rcd 5374 (1988).

<sup>17</sup> Letter from James W. Hill, Vice President, Southern, to Secretary, FCC (May 5, 1995), included as Exhibit N to Application for Review.

<sup>18</sup> Letter from Acting Secretary, FCC to James Hill, Vice President, Southern (Sept. 20, 1995) included as Exhibit R to Application for Review.

which the staff based its waiver decision, and the *ex parte* letter does not warrant denial of equitable relief. Nor, as discussed further below, are we persuaded by Piedmont's other arguments that equitable relief is unwarranted. Southern built the station based on authority contained in the initial staff decision, which found that an extension request complied with the rules then in effect and relevant precedent. Southern was not unreasonable in relying on that authority to proceed.<sup>19</sup> It is true that Southern proceeded at its own risk in consummating the assignment and in constructing the station while Piedmont's reconsideration request was pending. Nevertheless, we find no error in the staff's determination that the facts supported a waiver of the construction rules then in effect.<sup>20</sup>

8. Piedmont next alleges that the staff exceeded its delegated authority by issuing the waiver.<sup>21</sup> The Commission reserves for itself authority to consider petitions and waiver requests that "contain new or novel arguments not previously considered by the Commission or present facts or arguments which appear to justify a change in Commission policy."<sup>22</sup> Piedmont asserts that only the Commission itself can consider waiver requests based on equitable principles. According to Piedmont, such waivers always involve new and novel arguments that the Commission has not previously considered because waivers involve unique, case-specific factors that must be weighed and balanced.

9. We disagree. Piedmont does not cite any case in support of its argument that the application of equitable principles always involves a "new or novel" issue. The staff has long applied equitable principles on a case-by-case basis, without referring such cases to the Commission.<sup>23</sup> There is nothing necessarily novel or policy-oriented about waivers of broadcast construction deadlines.<sup>24</sup> In fact, the Commission has clearly stated that waivers of the construction deadlines will be entertained, without limiting the staff's ability to consider such requests.<sup>25</sup> In any event, since we are considering and affirming the staff's waiver, the

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<sup>19</sup> Compare, *WDBS, Bolingbroke, Georgia*, 11 FCC Rcd 5320 (1996) (denying authorization to applicant that constructed with no authority after staff denial of its extension request).

<sup>20</sup> See generally *Hooten Broadcasting*, 13 FCC Rcd 15023 (1998) (waiver of former extension rules upheld over "unclean hands" objection).

<sup>21</sup> See 47 C.F.R. § 0.283.

<sup>22</sup> 47 C.F.R. § 0.283(b)(4).

<sup>23</sup> See, e.g., *North Pittsburgh Telephone Co.*, 11 FCC Rcd 7626, 7630-32 (C.C.B. 1996) (considering and rejecting showing of "special circumstances" in connection with request for waiver of rules defining eligibility as "small" telephone company). Staff consideration of waiver requests in broadcast cases dates back to the early days of the industry. See *Amendment of Part O to Delegate to the Chief, Broadcast Bureau, Authority to Waive the Provisions of Section 73.117 and 73.287*, 11 R.R.2d 1627 (1967).

<sup>24</sup> See *William J. Kitchen*, 7 FCC Rcd 4169, 4170 (1992), quoting *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 365-66 (D.C. Cir. 1987) ("[T]he Commission has the discretion to evaluate extension requests on a case-by-case basis, and so long as there is no evident disregard for Commission precedent, the staff retains the flexibility to bring its informed discretion to bear in resolving close cases and accommodating special circumstances.").

<sup>25</sup> *Streamlining*, 14 FCC Rcd at 17541. See also *Wendell & Associates*, 17 FCC Rcd 18576 (2002) (affirming the staff's denial of a request to waive the construction deadline). See generally *Peninsula Communications, Inc.*, 13 FCC Rcd 23992, 23997 (1998) (staff waiver of translator ownership rule to avoid loss of service to the public in "white area" upheld by Commission), 16 FCC Rcd 11364, 11370 (2001) (order to show cause why the waivers should not be discontinued due to operational status of new FM station), 18 FCC Rcd 4027 (A.L.J. 2003) (terminating translator

delegated authority issue is moot.

10. Finally, Piedmont maintains that HarryCo was not entitled to a waiver under the doctrine of unclean hands – the principle that wrongdoers are not entitled to equitable relief.<sup>26</sup> Piedmont alleges that HarryCo had unclean hands because it made misrepresentations to the Commission. Piedmont makes identical arguments of misrepresentation in connection with HarryCo's assignment of the construction permit to Southern. Those arguments are discussed in greater detail below, and rejected.<sup>27</sup> For the same reasons, we conclude that those allegations do not warrant denial of equitable relief to HarryCo. Accordingly, we conclude that WKVE was constructed pursuant to a valid permit.

## B. Assignments of Permit and License

11. **Alleged Misconduct by Assignor HarryCo.** Piedmont claims that HarryCo misrepresented facts to the Commission and was thus unqualified to assign WKVE's construction permit to Southern. HarryCo made two different showings of its reasonable and prudent expenses in connection with a "no profit" showing it was required to submit with its assignment application.<sup>28</sup> Piedmont argues that the showings conflict with one another and that one of the two showings must have been falsified.<sup>29</sup> Piedmont also maintains that the staff did not adequately explain its rejection of that argument.

12. HarryCo first listed expenses totaling \$155,749.37. In response to Piedmont's petition to deny, HarryCo revised its claim to \$156,783.14. The staff approved only \$63,137.02 of these expenses, the portion that HarryCo adequately documented as reasonable and prudent expenses related to acquisition and disposition of the permit. The staff observed that HarryCo's revised summary significantly reallocated expenses within certain categories, and that HarryCo had not explained some of those revisions, but concluded that there was no misrepresentation. As the staff explained, misrepresentation is a false statement of fact made with intent to deceive the Commission.<sup>30</sup> No intent to deceive was shown here. HarryCo

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waiver based on newly operational first FM service in the community).

<sup>26</sup> Piedmont alleges that several cases support use of the unclean hands doctrine in administrative proceedings such as this one. See *Carroll Touch, Inc. v. Electro Mechanical Sys., Inc.*, 15 F.3d 1575, 1581 (Fed. Cir. 1993); *Consolidated Aluminum Corp. v. Foseco Int'l, Ltd.*, 910 F.2d 804, 812 (Fed Cir. 1990); *WKAT, Inc. v. FCC*, 296 F.2d 375, 383 (D.C. Cir. 1961).

<sup>27</sup> See *TCI Cablevision of Oakland County, Inc.*, 13 FCC Rcd 16400 (1998) (unclean hands argument will not be considered where it duplicates an argument already rejected); See also *Hooten Broadcasting, Inc.*, 13 FCC Rcd 15023 (1998) (where petitioner did not demonstrate character violations by an applicant, it did not show that the unclean hands doctrine precluded waiver of the broadcast construction rules).

<sup>28</sup> Under the rules in effect at the time, the staff could not approve an application to assign the construction permit for an unbuilt station if the parties would receive consideration exceeding reasonable and prudent expenses. See 47 C.F.R. § 73.3597(c) (1996).

<sup>29</sup> Piedmont highlights changes such as HarryCo's claim of a van as a \$16,875 expense on the first statement, and exclusion of this item on its second statement after Piedmont noted that the van had been repossessed and was not being assigned.

<sup>30</sup> See *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129 (1983); see also *LUJ, Inc.*, 17 FCC Rcd 16980 (2002).

adjusted its claims upon learning, from Piedmont's petition to deny, that some of the original amounts were not recoverable or lacked required documentation.<sup>31</sup> The staff properly addressed the matter by approving reimbursement only of fully documented, legitimate and prudent expenses associated with the acquisition and sale of the WKVE permit. The figures in HarryCo's original showing are not necessarily false merely because HarryCo amended them in response to Piedmont's challenge. Piedmont's suggestion that amendments always indicate known falsehoods is incorrect. Our acceptance of that argument would discourage correction of legitimate mistakes or misunderstandings.<sup>32</sup>

13. Piedmont also alleges that HarryCo submitted a forged document to the Commission, *i.e.*, a February 5, 1993, lease that the property owner, Mr. Gus Dyer, claimed not to have signed.<sup>33</sup> Dyer claims that he did not sign the actual lease until March 21, 1993, and that the signature on the earlier document is not his own.

14. Upon reviewing the pertinent facts we conclude that Piedmont has failed to raise a substantial and material question of fact concerning any intent by HarryCo to deceive the Commission. HarryCo submitted the lease in connection with four requests for an extension of time, the earliest of which we received on September 27, 1993, well after the lease was signed, which Dyer acknowledges was in March of that year. It is not clear who signed Dyer's name to the February lease, and HarryCo states that it mistakenly submitted a draft of the lease. This claim is credible because HarryCo could have filed a copy of the final March lease when it filed its extension application in September, six months later. Accordingly, we reject Piedmont's allegations that HarryCo misrepresented facts to the Commission or lacked the requisite character qualifications to assign the permit to Southern.<sup>34</sup>

15. **Alleged Falsification of Documents by Southern.** Piedmont also alleges that Southern falsified documents submitted with its Opposition to the Application for Review.<sup>35</sup> Piedmont maintains that

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<sup>31</sup> HarryCo maintains that its changes were an appropriate response to Piedmont's assertions, which alerted it to the need to submit additional documentation for some matters and to adjust the amounts claimed for others. For example, HarryCo states that it reduced its claims for employee salary in half, in recognition of the fact that the employees worked for an additional HarryCo station as well as WKVE. In response to Piedmont's statement that HarryCo's claim of \$9,535 for studio lease costs was overstated, HarryCo states that it determined that the amount was understated because the lessor was maintaining that it owed more than \$48,000 for the studio lease, including late fees, and that it therefore adjusted its claim upward to the larger amount.

<sup>32</sup> See generally, *Fatima Response, Inc.*, 14 FCC Rcd 18543 (1999), *recon dismissed*, 15 FCC Rcd 10520 (2000) (no misrepresentation found where submission of inaccurate information was due to carelessness, and applicant was willing to correct its mistake).

<sup>33</sup> These matters were alleged in a Petition for Reconsideration of the HarryCo/Southern assignment filed by Dyer. The staff dismissed Dyer's petition because he failed to demonstrate pursuant to 47 C.F.R. § 1.106(b)(1) why he was not able to participate in earlier stages of the proceeding. Piedmont, which has been a party throughout this proceeding, also raised this forgery issue in its Reply to Petition to Deny, and we will thus consider the issue herein.

<sup>34</sup> See *Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1193-95 (1986), *recon. granted in part, denied in part*, 1 FCC Rcd 421, *modified*, 5 FCC Rcd 3252 (1990).

<sup>35</sup> Piedmont makes these allegations in a Consolidated Reply and in a Complaint, both filed November 14, 1996. The Consolidated Reply seeks adverse action on applications, while the Complaint requests investigation into Southern's qualifications, and criminal charges. See 47 C.F.R. § 1.17 (truthful written statements); 18 U.S.C. § 1001 (fraud and

the altered documents were designed to influence the Commission in its consideration of the assignment of the station's construction permit. We have considered Piedmont's submissions under the two-step analysis in *Astroline Communications Co. v. FCC*.<sup>36</sup> We find that Piedmont has made a *prima facie* case that documents submitted to us were altered with an intent to deceive, that Southern does not adequately rebut Piedmont's showing, and that a monetary forfeiture for misrepresentation appears appropriate. We conclude, nevertheless, that Piedmont has failed to raise a substantial and material question of fact as to Southern's basic qualifications or as to whether grant of any of the applications would serve the public interest.<sup>37</sup>

16. A misrepresentation is a false statement made with intent to deceive the Commission.<sup>38</sup> Intent can be inferred from motive.<sup>39</sup> At issue here is whether Southern made misrepresentations to the Commission by changing the dates of two letters from local officials prior to submitting them to the Commission, without the knowledge or consent of the signatories. Southern submitted the letters on October 22, 1996,<sup>40</sup> as part of its Opposition to the Application for Review. The purpose of the letters was to refute Piedmont's October 7, 1996, allegation, discussed previously, that the station did not "serve" Semora. Piedmont alleges that Southern falsified the dates so that the letters would seem to have been unsolicited and written before Piedmont's programming-related allegation.<sup>41</sup> It submits a declaration under penalty of perjury from Piedmont's president, T. David Luther ("Luther"), describing his meetings with the two signatories, Caswell County Manager, Paul C. Tax ("Tax") and Caswell County Sheriff, J. J. Smith ("Smith"). According to that declaration, Tax told Luther that he wrote a letter at the request of Southern's President, Samuel Cooper, so that Southern could show that WKVE served Semora.<sup>42</sup> Luther presented Tax with a copy of the letter as submitted to the Commission, and states that Tax noticed a change in the letter's date from October 15, 1996, to July 23, 1996. As further proof that the date of Tax's letter was altered, Luther states that two Caswell County officials mentioned in Tax's letter were not guests on the station until August, more than two weeks after the date on the allegedly altered letter. Luther submits a copy of the letter as obtained from Tax, which is dated October 15, 1996, in a typeface identical to the rest of the letter. The typeface of the July 23, 1996, date in the letter that Southern submitted to the Commission does not match the body of the letter. Luther's declaration also relates his conversation with Sheriff Smith, signatory to a second letter that Southern submitted to the Commission. According to the declaration, Smith told Luther that the date of Smith's letter was changed from October 14, 1996, to September 27, 1996. Piedmont does not submit a copy of a Smith letter bearing the alleged October date, but observes that the September date in the letter

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false statements in federal proceedings).

<sup>36</sup> *Astroline Communications Co. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

<sup>37</sup> *See Serafyn v FCC*, 149 F.3d 1213, 1216 (D.C. Cir. 1998).

<sup>38</sup> *Fox River Broadcasting, Inc.*, 93 F.C.C.2d 127, 129 (1983).

<sup>39</sup> *Black Television Workshop*, 8 FCC Rcd 4192, 4198 n.41 (1993) (subsequent history omitted).

<sup>40</sup> The submission was made within the current term of WKVE's license. The license was granted on September 11, 1996, and will not expire until December 1, 2003. Accordingly, consideration of a forfeiture for any misconduct in connection with this submission is timely. *See* 47 C.F.R. § 1.80(c).

<sup>41</sup> *See* note 14 *supra*.

<sup>42</sup> The staff has a pending application on FCC Form 316 to transfer control of Southern from Samuel Cooper to James Hill (File BTCH-19980827EC).



filed with the Commission also uses a different typeface than the body of the letter.<sup>43</sup> The typefaces of the two allegedly altered dates in the Smith and Tax letters are identical to each other, but do not match the text of either letter. The date of the Smith letter is also misaligned with the text and letterhead of that letter. Southern does not dispute the validity of the documentary evidence suggesting that the dates of the letters were altered. In fact, a document that Southern was required to maintain in the station's public inspection file and which it submitted to the Commission in a related proceeding supports Piedmont's arguments that the dates were altered.<sup>44</sup> The station's list of its most significant issue-responsive programs for the third quarter of 1996 indicates that Tax appeared as a guest on July 11, 1996. If Tax's letter referred only to his own appearance on WKVE(FM), the letter's July 23, 1996, date as submitted by Southern might appear reasonable. However, Tax's letter also refers to appearances by Jeff Rudd, County Economic Development Director, and Lee Fowlkes, Director of the Caswell County Civic Center. The station's issues/program list indicates that Mr. Fowlkes and Mr. Rudd did not appear on the station until August 6, 1996, and August 7, 1996, respectively. It would have been impossible for Tax to reference those appearances if the July 23, 1996, date of the letter submitted by Southern were correct.

17. Luther's statements about conversations with local officials are hearsay, to which we would generally afford little, if any, value. Nevertheless, Luther's declaration provides useful background for our consideration of highly unusual documentary evidence in this record, *i.e.*, documents submitted for our consideration that are inconsistent with undisputed facts and appear plainly to have been altered. As we have already stated, intent to deceive is a factual question that can be inferred from motive.<sup>45</sup> Piedmont submits that intent to deceive may be inferred from the fact that Piedmont had previously put in issue whether Southern was adequately serving Semora. Letters of community support from Semora-area officials written months or weeks prior to Piedmont's allegation and Southern's response might appear more genuine or spontaneous than letters written after that time. We find that Piedmont has made a *prima facie* showing of misrepresentation, *i.e.*, that Southern submitted altered documents with a motive to deceive the Commission. Accordingly, we next consider the entire record, including Southern's replies, to determine whether there remain any substantial and material questions appropriate for resolution in hearing.

18. Southern submits May 20, 1997, affidavits from Samuel Cooper and James Hill, Southern's President and Vice-President respectively, stating that they did not alter the dates or ask anyone else to do so. They state that at the time the letters were submitted to the Commission they were unaware of any alterations and have no knowledge of who may have altered the letters. Southern also claims that the letters were not submitted to establish the dates on which the programming aired. Southern argues that the letters in question were provided solely as "ancillary evidence" supporting Southern's own declaration as to the programming it

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<sup>43</sup> The Smith letter refers to Hurricane Fran as occurring "a few weeks ago" but that reference is not conclusive as to the date of the letter. We take notice that Hurricane Fran hit North Carolina on September 6, 1996. See <http://lwf.ncdc.noaa.gov/oa/reports/fran/fran.html#INTRO>. Either the September 27, 1996, date on the letter as submitted to the Commission or the October 14, 1996, date claimed in the affidavit are plausible.

<sup>44</sup> See 47 C.F.R. § 73.3526(e)(12). Southern submitted issues/programs lists from its public inspection file in response to Piedmont's petition to deny a 1997 application to assign the station's license to Pinnacle Southeast, Inc. Southern intended the lists to rebut Piedmont's argument in that case concerning the adequacy of Southern's issue-responsive programming. Action on the application to assign the license to Pinnacle Southeast was deferred and Southern has since applied to assign the license to EMF instead.

<sup>45</sup> *Black Television Workshop*, 8 FCC Rcd 4192, 4198 n.41 (1993) (subsequent history omitted).

directs to Semora and the surrounding area. According to Southern, the relevant point is program content, and the dates of the letters are not material to the Commission's review of this issue. Southern does not dispute that local officials did not appear as guests on the station until after the dates of the letters, as submitted to the Commission. Even if we concede that the actual dates of the letters would have had little impact on Southern's overall position in this contested proceeding, Southern's argument ignores the Commission's longstanding policy that requires truthfulness and candor by all licensees in dealing with the Commission.<sup>46</sup> Southern's President and Vice-President may not have altered the dates, but we cannot from the record exclude others associated with the company from having taken such action.

19. Southern states that, assuming *arguendo* that the dates of the letters were changed, we should nevertheless find it qualified as a licensee. It alleges that the facts of this case are similar to several cases in which the Commission found no actionable misrepresentation despite factual inconsistencies in the record.<sup>47</sup> The facts of the cases that Southern cites differ from the facts of the present case. In those cases the Commission found no motive or intent to deceive the Commission, whereas we believe that Piedmont has shown a motive to make the letters appear more genuine as unsolicited testimonials, rather than as documents written to refute recent statements of an opposing party.

20. Southern does not adequately rebut Piedmont's *prima facie* showing of misrepresentation. We conclude that Southern violated Section 1.17 of our rules because the altered letters submitted in Southern's Opposition to the Application for Review were untruthful written statements, made in a pleading submitted to the Commission, bearing on a matter within the Commission's jurisdiction.<sup>48</sup> We have studied possible actions, including whether to convene a hearing on Southern's qualifications to remain a broadcast licensee, and on its qualifications to assign the permit to EMF. We find, however, that the particular factual questions raised in this case are not significant enough to warrant a hearing as to Southern's basic qualifications to be a Commission licensee.<sup>49</sup> Specifically, the conduct was isolated to one pleading, was not decisionally significant,<sup>50</sup> and the letters in question were not submitted in response to any Commission question or inquiry.<sup>51</sup> Moreover, the licensee is seeking to sell its only station, and the proposed assignee is a non-profit

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<sup>46</sup> See *Character Qualifications in Broadcast Licensing*, 102 F.C.C.2d at 1190-91 (Commission is concerned with "misconduct which demonstrate[s] the proclivity of an applicant to deal truthfully with the Commission and to comply with our rules and policies").

<sup>47</sup> See *Broadcast Associates of Colorado, Inc.*, 104 F.C.C.2d 16 (1986) (applicant did not make actionable misrepresentation when it certified that all information in application was true and complete, although at time of certification, applicant had not reviewed engineering portion of application); *OPUS Media Group, Inc.*, 11 FCC Rcd 15485 (1996) (allegations of misrepresentation unsupported by documentation); *Joseph Bahr*, 10 FCC Rcd 32 (Rev. Bd. 1994) (no *prima facie* case of intent to deceive).

<sup>48</sup> 47 C.F.R. § 1.17.

<sup>49</sup> Similarly, the nature of the matters here are not, as Piedmont claims, appropriate for referral to the Department of Justice for prosecution under 18 U.S.C. § 1001. Cf. *Berlin Communications, Inc. v. FCC*, 626 F.2d 869, 875 (D.C. Cir. 1979) (urging the Commission to refer to the U.S. Attorney for prosecution cases "of the magnitude and as obvious as" one in which a broadcaster's license was revoked for fraudulent practices).

<sup>50</sup> The misrepresentation was limited to the date of the letters, not their content.

<sup>51</sup> See 47 C.F.R. § 73.1015 (truthful written statements in response to Commission inquiries).

organization whose character qualifications have not been challenged. In several other cases involving misstatements of a generally similar magnitude, we found it unnecessary to convene a hearing to consider the applicant's basic qualifications, and instead took appropriate action to sanction the applicant's conduct.<sup>52</sup> Consistent with that precedent, we will not designate Southern's applications for hearing.

21. We conclude, however, that a forfeiture is appropriate for Southern's misrepresentation. The guidelines contained in the Commission's *Forfeiture Policy Statement*<sup>53</sup> specify that the base forfeiture for misrepresentation is the statutory maximum for the service, which for broadcast stations is \$27,500. The guidelines permit the Commission to issue a higher or lower forfeiture based upon the factors set forth in Section 503(b)(2)(D) of the Communications Act of 1934, as amended.<sup>54</sup> The facts of the current case meet two circumstances for downward adjustment of forfeitures. First, although any misrepresentation to the Commission is a serious matter, this particular violation is relatively minor. As indicated previously, the misrepresentation appeared in two letters addressing the same issue, and was limited to the letters' dates rather than content. The second factor for downward adjustment of the forfeiture is history of overall compliance. The Commission has not previously found Southern in violation of our rules. In weighing these factors for reduction, however, we also consider the necessity that the Commission must rely on the truthfulness of applicants and licensees, and therefore that any deceptive submission or omission in a Commission proceeding is thus of great concern.<sup>55</sup> Considering the totality of these factors, we find that the appropriate forfeiture in the current case is \$19,250, a 30 percent reduction of the base forfeiture amount.

22. In view of the above, pursuant to 47 U.S.C. § 503(b), Southern Entertainment, Inc. IS HEREBY ADVISED of its apparent liability for forfeiture of Nineteen Thousand Two Hundred Fifty Dollars (\$19,250.00) for its apparent willful or repeated violation of 47 C.F.R. § 1.17. In regard to this forfeiture, Southern is afforded a period of thirty (30) days of this Notice "to show, in writing, why a forfeiture penalty should not be imposed or pay the forfeiture. Any showing as to why the forfeiture should not be imposed or reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent."<sup>56</sup>

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<sup>52</sup> See *Edwin L. Edwards, Sr.*, 16 FCC Rcd 22236, 22248-49 (2001) (monetary forfeiture appropriate when principal temporarily abdicated control, but warning sufficient for misstatement); *Knox Broadcasting, Inc.*, 12 FCC Rcd 3337 (1997) (admonishing permittee for isolated failure in extension application to provide accurate information regarding its finances, zoning, and construction time frame); *Zephyr Broadcasting, Inc.*, 11 FCC Rcd 19627 (1996) (admonishing permittee for isolated failure to disclose loss of financial qualifications). Compare *Contemporary Media, Inc.*, 14 FCC Rcd 8790 (1999) *subsequent history omitted* (revocation of broadcast license after hearing based in part on licensee's knowingly false statements to Commission concerning involvement of a convicted child molester in station operations); *Chameleon Radio Corp.*, 11 FCC Rcd 11088 (1996), *license revoked in hearing* 12 FCC Rcd 19348 (ALJ 1997) (license revocation based on licensee's false statement of involuntarily site loss in connection with request to operate from a different location, when licensee abandoned the original site because it preferred to serve a different community).

<sup>53</sup> *Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, 12 FCC Rcd 17087, 17115 ("Forfeiture Policy Statement").

<sup>54</sup> 47 U.S.C. § 503(b)(2)(D); see also 47 C.F.R. § 1.80(b)(4).

<sup>55</sup> Cf. *Federal Communications v. WOKO, Inc.*, 329 U.S. 223, 227 (1946) (even seemingly "useless" deceptions are of concern).

<sup>56</sup> 47 C.F.R. § 1.80(f)(3).

### C. Upgrade of Technical Facilities

23. In a second Application for Review, filed October 29, 1998, Piedmont alleges that the staff erroneously granted Southern's application for a minor modification to upgrade the station's facilities from Class A to Class C2 ( the "Upgrade Application"). On similar grounds, Piedmont, on May 24, 2001, objected to Southern's April 17, 2001, application for a license to cover the completed facility.<sup>57</sup>

24. According to Piedmont, the Upgrade Application was defective as filed because it proposed a facility that was short-spaced to the licensed facilities of station WEND(FM), Salisbury, North Carolina.<sup>58</sup> At the time of filing the Upgrade Application was fully spaced to a pending license application to cover a WEND(FM) downgrade. Relying on a staff decision in *Cut and Shoot, Texas*,<sup>59</sup> Piedmont argues that the staff should have dismissed the Upgrade Application. Alternatively, Piedmont argues that the staff should have considered the Upgrade Application as filed on the date the staff granted a license to cover WEND(FM)'s downgrade. The suggested change in filing date would make Southern's Upgrade Application secondary to a rulemaking petition filed by Greater Lynchburg Stereo for an allotment in Amherst, Virginia. That rulemaking proponent is not a party to this proceeding but is represented by the same counsel as Piedmont. Piedmont argues that the staff's handling of the Upgrade Application conflicts with a policy enunciated in the Commission's *Technical Streamlining* decision, requiring that applicants continue to protect the authorized facilities of a downgrading station until the modified facilities are licensed.<sup>60</sup>

25. The following dates are important to our resolution of this issue. On February 14, 1995, WEND, Salisbury, North Carolina, filed a one-step application to downgrade its facilities. The staff granted a construction permit for the downgrade on January 16, 1996. Thereafter, on March 7, 1996, Southern filed a one-step minor change application for WKVE, Semora, North Carolina, to upgrade from a Class A to a Class C2 FM station. The Upgrade Application protected the approved downgrade of WEND, but not WEND's then-licensed facilities. On March 13, 1996, Greater Lynchburg Stereo filed the Amherst rulemaking petition. The staff issued a Notice of Proposed Rulemaking on May 1, 1996, proposing to grant the Amherst proposal with a site restriction to protect the Class A facilities of WKVE, Semora, but without mentioning the Semora station's proposed Class C2 upgrade.<sup>61</sup> The rulemaking proceeding remains pending. On September 24, 1997, WEND filed an application for license to cover the permit specifying the downgraded facilities.<sup>62</sup> The staff granted WEND's application to license its downgraded facilities on December 21, 1997. The staff, on December 23, 1997, granted a construction permit for Southern's upgrade of WKVE.

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<sup>57</sup> The construction permit for the upgrade had been tolled pursuant the Commission's revised construction rules. See 47 C.F.R. § 73.3589.

<sup>58</sup> See 47 C.F.R. § 73.207.

<sup>59</sup> *Cut and Shoot, Texas*, 11 FCC Rcd 16383 (M.M.B. 1996).

<sup>60</sup> *Streamlining of Radio Technical Rules*, 14 FCC Rcd 5272, n.45 (1999).

<sup>61</sup> *Amendment of Table of Allotments (Amherst and Lynchburg, Virginia)*, 11 FCC Rcd 5247 (M.M.B. 1996).

<sup>62</sup> See File No. BLH-19970924KE.

26. Under the Commission's rules, an application must generally protect licensed facilities, construction permits and prior-filed applications.<sup>63</sup> In the case of modifications to licensed facilities, applications must continue to protect the formerly licensed facilities until the grant of the covering license application for the modified facility. As Piedmont correctly notes, rulemaking petitions also must continue to protect licensed facilities, notwithstanding the fact that a modification application has been granted or a covering license application for a modified facility is pending.<sup>64</sup> At the time the Upgrade Application was filed, our rules also prohibited contingent applications for interrelated modifications of FM stations.<sup>65</sup> For the reasons stated above, the acceptability of the WKVE upgrade on the date of filing was contingent on the grant of the WEND downgrade. Thus, we agree with Piedmont that the Upgrade Application was unacceptable at the time of filing. Had the staff first considered the Upgrade Application, it would have issued a deficiency letter. At that point, Southern would have been required to amend its proposal and would have been given a date certain by which such an amendment was due. Failure to amend by the deadline would have resulted in dismissal of the Upgrade Application.<sup>66</sup> However, before the staff could examine Southern's Upgrade Application and set any deadline for corrective amendments, the staff acted on the WEND license application. Grant of the WEND license application, eliminated the requirement to protect the formerly licensed WEND facilities, and thus, cured the Upgrade Application's acceptability defect. Our broadcast licensing procedures do not require the return of applications that were unacceptable at the time of filing but which came into compliance with our technical rules prior to the deadline for corrective amendments. We will not take adverse action on Southern's Upgrade Application based solely on its acceptability as filed, when subsequent events prior to staff review resulted in a fully acceptable application.

27. We also reject Piedmont's contention that we should consider the staff's licensing of WEND's downgrade as an "amendment" to the Upgrade Application, thereby making the Upgrade Application subject to our conflicts rules with regard to mutually exclusive petitions for rulemaking filed prior to the date of amendment. Minor change applications take priority over subsequently filed rulemaking petitions.<sup>67</sup> If, however, the application is amended to conflict with a rulemaking request filed prior to the date of the amendment, the application is treated as filed on the date of the amendment and thereby loses its priority to the rulemaking.<sup>68</sup> Piedmont cites no support for its *de facto* amendment theory, and we are aware of none. We decline to adopt in this adjudicatory proceeding a change in our processing policies that would tie an application's cut-off rights to the date on which the application became "acceptable." The staff followed established licensing procedures in this case, granting the WKVE upgrade without consideration of the

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<sup>63</sup> 47 C.F.R. § 73.207.

<sup>64</sup> *Cut and Shoot, Texas*, 11 FCC Rcd at 16383-84.

<sup>65</sup> See 47 C.F.R. § 73.3517 (1996), *modified Streamlining of Radio Technical Rules, Report and Order*, 14 FCC Rcd 5272 (1999).

<sup>66</sup> See, e.g., *State of Oregon, Memorandum Opinion and Order*, 15 FCC Rcd 15456 (2000) (affirming dismissal of application for a new construction permit that would conflict with another station's licensed facilities, despite the existing station's pending application to license different facilities).

<sup>67</sup> 47 C.F.R. § 73.208 (a)(3)(iii).

<sup>68</sup> *Id.*; See also *Conflicts Between Applications and Petitions for Rule Making to Amend the FM Table of Allotments*, 8 FCC Rcd 4743 (1993).

formerly licensed facilities of WEND.<sup>69</sup>

### III. Ordering Clauses

28. Accordingly, IT IS ORDERED, that pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Section 1.80 of the Commission's rules, 47 C.F.R. § 1.80, Southern Entertainment, Inc. licensee, Station WKVE(FM), Semora, North Carolina, is hereby NOTIFIED of its APPARENT LIABILITY FOR FORFEITURE in the amount of Nineteen Thousand Two Hundred Fifty (\$19,250.00) for willfully and repeatedly violating Section 1.17 of the Commission's rules, 47 C.F.R. § 1.17.

29. IT IS FURTHER ORDERED, pursuant to Section 1.80 of the Commission's rules, that within thirty days of the release of this Notice, Southern Entertainment, Inc., SHALL PAY to the United States the full amount of the proposed forfeiture or SHALL FILE a written statement seeking reduction or cancellation of the proposed forfeiture.

30. Payment of the forfeiture may be made by credit card through the Commission's Credit and Debt Management Center at (202) 418-1195, or by mailing a check or similar instrument, payable to the order of the Federal Communications Commission, to the Federal Communications Commission, P.O. Box 73482, Chicago, Illinois 60673-7482. The payment should note the file numbers of this proceeding.

31. The response, if any, must be mailed to Peter H. Doyle, Chief, Audio Division, Media Bureau, 445 Twelfth Street, S.W., Room 2-A360, Washington, D.C. 20554, and MUST INCLUDE the NAL/Account number referenced in the caption of this document (20031810005).

32. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the petitioner submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared accordingly to generally accepted accounting practices; or (3) some other reliable and objective documentation that accurately reflects the petitioner's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.

33. Requests for payment of the full amount of this Notice of Apparent Liability under an installment plan should be sent to: Chief, Credit and Debt Management Center, 445 Twelfth Street, S.W., Washington, D.C. 20554.<sup>70</sup>

34. IT IS FURTHER ORDERED, that the Complaint filed by Piedmont Broadcasting Corp. on November 14, 1996, IS GRANTED TO THE EXTENT INDICATED HEREIN AND DENIED in all other respects.

35. IT IS FURTHER ORDERED, that pursuant to Section 1.115(g) of the Commission's Rules, 47 C.F.R. § 1.115(g), the Applications for Review filed by Piedmont Broadcasting Corp. on October 7, 1996, and on October 29, 1998, concerning extension of HarryCo's permit, assignment of that permit to Southern, and an additional permit to upgrade WKVE's facilities, ARE HEREBY DENIED.

<sup>69</sup> Piedmont has not demonstrated standing as a party in interest with respect to the Amherst rulemaking. No party in interest to that proceeding filed an objection to the Upgrade Application.

<sup>70</sup> See 47 C.F.R. § 1.1914.

36. IT IS FURTHER ORDERED, that Piedmont's objection to the application for a license to cover (File No. BLH-20010417AAD) the modified facilities IS DENIED and that application IS GRANTED.

37. IT IS FURTHER ORDERED, that the Petition to Deny filed by Piedmont Broadcasting Corp. concerning the application to assign the license of WKVE(FM) from Southern Entertainment, Inc. to Educational Media Foundation (File No. BALH-20010329AAK), IS DENIED.

38. IT IS FURTHER ORDERED, that having found the parties qualified and the transaction consistent with the public interest, that the application to assign the license of WKVE(FM) from Southern Entertainment, Inc. to Educational Media Foundation (File No. BALH-20010329AAK) IS GRANTED.<sup>71</sup>

39. IT IS FURTHER ORDERED, that the application to license WKVE(FM) as a noncommercial educational station (File No. BMLHED-20010502ABA) IS GRANTED conditioned upon the consummation of the assignment to Educational Media Foundation.

40. IT IS FURTHER ORDERED that a copy of this Notice shall be sent, by Certified Mail - Return Receipt Requested, to Southern Entertainment, Inc., 4902 N. Ocean Blvd., Myrtle Beach, South Carolina, 29577 and to its counsel John. S. Neely, 6900 Wisconsin Ave., Suite 704, Bethesda, Maryland 20815.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch  
Secretary

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<sup>71</sup> The assignment authorization shall contain the following condition: The parties shall not consummate this transaction prior to a grant of the pending license renewal application for station WKVE(FM), File No. BRH-20030801AJL.